UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Plaintiff,

v.

CRAIG FARWELL, *et al.*,

Defendants.

3:03-cv-00500-LRH-VPC

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion to dismiss for failure to exhaust administrative remedies (#79). Plaintiff opposed (#90), and defendants replied (#99). For the reasons stated below, the court recommends that defendants' motion (#79) be denied.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Larry Wisenbaker ("plaintiff") is currently incarcerated at Lovelock Correctional Center ("LCC") in the custody of the Nevada Department of Corrections ("NDOC") (#16). Plaintiff filed his civil rights complaint on September 11, 2003, alleging that defendants violated his constitutional rights as a result of an attack, which occurred in January 2001 (#2). Defendants answered the complaint, asserting numerous affirmative defenses, including that plaintiff failed to exhaust all available administrative remedies (#26). On July 11, 2005, defendants filed a motion to dismiss for failure to exhaust administrative remedies as well as a motion for summary judgment (#33, #34). The district court adopted and accepted the report and recommendation of the undersigned magistrate judge and dismissed all claims (#47, #54).

On April 7, 2006, plaintiff filed a notice of appeal (#55). On August 16, 2007, the Ninth Circuit Court of Appeals notified the parties that it was holding plaintiff's appeal in abeyance pending a decision in *Ngo v. Woodford*, which the United States Supreme Court had remanded (#58).

See Woodford v. Ngo, 548 U.S. 81, 84 (2006). On September 26, 2008, the Circuit Court ordered the parties to file supplemental briefs "addressing the effect of this [circuit] court's decision in *Ngo v. Woodford*, 539 F.3d 1108 (9th Cir. 2008)" (#59). On May 26, 2009, the Circuit Court issued its memorandum decision, affirming in part, vacating in part, and remanding plaintiff's case to the District Court "to determine in the first instance whether the failure to train [officers in monitoring and responding to the use of the prison's intercom system] amounted to deliberate indifference" (#62).

The court "decline[d] to reach the defendants' argument, raised for the first time on appeal, that the untimeliness of [plaintiff's] grievance constitutes improper exhaustion under *Woodford v. Ngo*, 548 U.S. 81 (2006)." *Id.* However, on remand to this court, defendants raise the exhaustion defense, arguing that plaintiff's grievances were untimely (#79).

II. DISCUSSION & ANALYSIS

A. Discussion

1. Exhaustion of Administrative Remedies

a. Prison Litigation Reform Act

The Prison Litigation Reform Act of 1996 (the "PLRA") amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

Although once within the discretion of the district court, the exhaustion of administrative remedies is now mandatory. *Booth v. C.O. Churner*, 532 U.S. 731 (2001). Those remedies "need not meet federal standards, nor must they be 'plain, speedy, and effective.'" *Porter v. Nussle*, 534 U.S. 516, 524 (2002), citing *Booth*, 532 U.S. at 739-40 n.5. Even when the prisoner seeks remedies not available in the administrative proceedings, notably money damages, exhaustion is still required prior to filing suit. *Booth*, 532 U.S. at 741. Recent case law demonstrates that the Supreme Court has strictly construed section 1997e(a). *Id.* at 741 n.6 ("We will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise").

Plaintiffs must properly exhaust nonjudicial remedies as a precondition to bringing suit. The

PLRA requires "proper exhaustion," meaning that the prisoner must use "all steps the agency holds out, and doing so *properly* (so that the agency addresses the merits)." *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). Requiring exhaustion prior to filing suit furthers the congressional objectives of the PLRA as set forth in *Porter v. Nussle*, 534 U.S. 516, 524-25. *See id.* at 1200

b. NDOC Procedures

"Applicable procedural rules [for proper exhaustion] are defined not by the PLRA, but by the prison grievance process itself." *Jones v. Bock*, 549 U.S. 199, 218 (2007).

The NDOC grievance procedure is governed by Administrative Regulation 740 ("AR 740") (#79, Ex. A). Defendants submit the relevant version of AR 740 in effect at the time of plaintiff's filing of hs grievance. In order for plaintiff to exhaust available remedies at the time of his injury, AR 740 required the following: (1) an informal review process; (2) a first level formal grievance "specifying how and when an attempt was made to resolve the problem informally," directed to the Associate Warden of Programs; (3) a second level grievance, which is decided by the Warden; (4) a third level of review by the Chief of Classification and Planning; and (5) a fourth level of review by the Director, applicable for grievances which challenge institutional policies and procedures. *Id.* pp. 7-8.

From the outset, inmates were encouraged to resolve grievances informally, but the regulation noted that "if this effort fails, the inmate may file a formal grievance within fifteen days." *Id.* p. 7. Upon filing of the formal grievance, AR 740 required NDOC officials to respond at each level within a specified time period, beginning from the date of receipt of the grievance. *Id.* p. 3.

c. Dismissal of Claims for Failure to Exhaust

Failure to exhaust is an affirmative defense under the PLRA rather than a jurisdictional requirement, and defendants bear the burden of raising and proving that the plaintiff has not exhausted. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Wyatt v. Terhune*, 315 F.3d 1108, 1117 n. 9 (9th Cir. 2003), *cert denied*, 540 U.S. 810 (2003). Inmates are not required to specifically plead or demonstrate exhaustion in their complaints, rather, it is the defendant's responsibility to raise the issue in a responsive pleading. *Jones*, 549 U.S. at 216.

Failure to exhaust is treated as a matter in abatement, not going to the merits of the claim,

and is properly raised in an unenumerated Rule 12(b) motion. *Wyatt*, 315 F.3d at 1119. The court may look beyond the pleadings and decide disputed issues of fact without converting the motion into one for summary judgment; however, "if the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice." *Id.* at 1119-20, *as noted in O' Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059 (9th Cir. 2007); *see also, Rizta v. Int'l Longshoremen's and Warehousemen's Union*, 837 F.2d 365 (9th Cir. 1988) ("[F]ailure to exhaust nonjudicial remedies should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment.").

B. Analysis

Defendants maintain that the motion can and should be ruled upon, but plaintiff argues (1) that defendants' request exceeds the remand from the appellate court, and (2) that it is untimely (#90). The court addresses these arguments below.

1. Rule of Mandate

The Ninth Circuit Court of Appeals issued its memorandum decision on May 26, 2009, and on June 17, 2009, it issued its mandate (#62, #63). In vacating the District Court's grant of summary judgment, the memorandum decision provides:

> Wisenbaker presented evidence that there were no procedures or training on how to monitor or respond to the use of the prison's intercom system, creating a triable issue concerning whether the defendants properly supervised or trained officers. We remand for the district court to determine in the first instance whether the failure to train amounted to deliberate indifference.

(#62, p. 3). Despite supplemental briefing, the appellate court did not reach the question of exhaustion with respect to the timeliness of the grievance:

> We decline to reach the defendants' argument, raised for the first time on appeal, that the untimeliness of Wisenbaker's grievance constitutes improper exhaustion under *Woodford v. Ngo*, 548 U.S. 81 (2006). *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (explaining that, as a general rule, the court will not consider arguments that are raised for the first time on appeal).

Id. at 3-4. The court finds it reasonably necessary to explain its actions in light of the Circuit Court's mandate. *See, generally, Law v. Medco Research, Inc.*, 113 F.3d 781, 783 (7th Cir. 1997) ("[I]t is a big help for the reviewing court to be told by the district judge how he thought his decision on

remand followed from the appellate court's previous ruling on the same issues in the same case.").

"Although lower courts are obliged to execute the terms of a mandate, they are free as to anything not foreclosed by the mandate," *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (quotations omitted). "Under certain circumstances, 'an order issued after remand may deviate from the mandate . . . if it is not counter to the spirit of the circuit court's decision. . . . " *Id.* (quoting *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1404 (9th Cir.). "Although the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the district court any issue not expressly or impliedly disposed of on appeal.' " *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir.1986).

With respect to this issue, the court grapples with what may have been "expressly or impliedly disposed on appeal." *See id.* On one hand, as plaintiff argues, the appellate court specifically remanded the case "for the district court to determine in the first instance whether the failure to train amounted to deliberate indifference" (#62, p. 3). Although the appellate court did not expressly foreclose the exhaustion defense, its instruction to "determine" a triable issue of fact and the procedural stance of the issue before the appellate court (vacating the grant of summary judgment and remanding for determination of a triable issue of fact) would seem to indicate that a failure to exhaust should not preclude trial on this issue. In essence, plaintiff can argue that, in reaching its decision on vacating and remanding, the appellate court has instructed the lower court to hear this issue, thereby bypassing any previously asserted exhaustion defense. To dismiss the case on exhaustion would preclude any determination of the issue and, thus, flout the appellate court's mandate.

On the other hand, the appellate court specifically noted that it declined to reach the issue of exhaustion with respect to the timeliness of plaintiff's grievance. It is difficult for this court to find that the appellate considered, even impliedly, any aspect of exhaustion with respect to the remanded claim when the court expressly noted that it did not reach the issue. Underscoring this reading of the mandate is the rule that the lower court should look to what the appellate court considered and what it did not consider, and if the appellate court did not consider an issue, it is open for the lower court to address it. *See United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000) ("On

remand, courts are often confronted with issues that were never considered by the remanding court. . . . In such cases, "[b]roadly speaking, mandates require respect for what the higher court decided, not for what it did not decide." (quoting *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997))). This would strongly suggest that the court is free to consider the issue.

The court finds that the mandate does not preclude it from considering defendants' exhaustion argument. It appears that in expressly declining to reach the issue, the appellate court has left it for the lower court to consider. The appellate court did not indicate that defendants had waived the defense by not raising it below; the appellate court simply noted that it would not consider the issue because it was raised for the first time on appeal. *See* #62, pp. 3-4. Therefore, the court finds that it has the authority to address the issue. Since the PLRA requires that every prisoner must exhaust every claim and do so "properly," the court proceeds to address the motion. *See Woodford*, 548 U.S. at 84.

2. Timing of the Motion

Plaintiff argues that defendants' motion is untimely (#90, p. 3). Defendants contend that the motion is not untimely because the Supreme Court in *Woodford* and the circuit court's subsequent decision on remand, introduced new a new legal basis on which to assert the exhaustion defense that was previously unavailable.

Prior to *Woodford*, objection to a prisoner's untimely filing of a grievance was not available in this circuit. *See Ngo v. Woodford*, 403 F.3d 620, (9th Cir. 2005) (holding that prisoner's time-barred administrative appeal which resulted in no further level of appeal constituted exhaustion of administrative remedies). The Third, Seventh, and Tenth Circuits had held that untimely grievances did not constitute exhaustion, but the court finds it unreasonable to charge defendants with raising a legal argument that was soundly rejected in this circuit.

Defendants are correct in their assertion that *Woodford* broadened their legal basis on which to assert the defense. During the appeal and at the request of the appellate court, defendants asserted the defense in supplementary briefs, yet the appellate court declined to reach the issue (#60, #62). Thus, the availability of the defense only appeared with the issuance of the mandate on June 17, 2009. *See* Fed. R. App. P. 41(c) (effective date of mandate is the date of issue). Since defendants

had even briefed the issue before the appellate court, why defendants did not raise the issue shortly after June 17, 2009, remains a mystery.[1] Nevertheless, defendants raised their motion on January 5, 2010, less than six months after the mandate of the appellate court but three days prior to the court's order for submission of a pretrial order.[2]

Federal Rule of Civil Procedure 12(b) "requires that every defense to a claim for relief must be asserted in the responsive pleading if one is required." Indeed, defendants asserted the exhaustion defense in their answer. *See* #26, p. 5. Thus, the issue is whether defendants' assertion that plaintiff did not "properly exhaust" his claim six months after this court regained jurisdiction over the case constitutes undue delay amounting to waiver of the defense. The failure to exhaust remedies has been viewed as one of the Rule 12(b) defenses that can be waived. *See Wyatt*, 315 F.3d at 1117-18 n.9. However, this court does not find that the delay in this case constitutes waiver of the defense. Plaintiff was on notice of defendants' use of the defense from the answer as well as the Circuit Court's request for supplementary briefing the issue. In the context of other Rule 12 defenses, courts have found the defense waived only in circumstances of extensive delay. *Cf. Hamilton v. Atlas Turner*, 197 F.3d 58, 62 (2d Cir. 1999) (holding that defendant had forfeited its personal jurisdiction defense, which was raised in its answer, by withholding it for three years and only raising it on the eve of trial); *Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731 (7th Cir.1991) (holding that defendants had waived its objections to service where defense was raised six years after judgment).

Therefore, the court finds that the motion is timely and proceeds to rule upon it.

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[1] Although defendants make no mention of it, the court notes that the parties appear to have been engaged in settlement negotiations throughout this time.

[2] Both parties stipulated to extend submission of a joint pretrial order on two occasions (#74, #76). One day after the deadline for submission of the joint pretrial order, defendants submitted a third motion to extend time to submit a joint pretrial order (#77). Citing inclement weather and lack of training in how to e-file documents, defendants "beg[ged] the Court's indulgence and request[ed] that under the circumstances they not be penalized for this Motion one day past the due date." The court granted an extension (#78). In their reply to this motion, defendants note that plaintiff filed his opposition one day late (#99, p. 2 n. 2). Defendants "leave it to the Court's discretion as what, if any, sanction should be imposed," yet they stress that, they bring it to the Court's attention "in order to preserve the record." *Id.* In light of both parties negligence in failing to meet deadlines, the court does not feel that plaintiff's failure to meet the deadline in this instance is conduct worthy of sanction.

3. Plaintiff's Exhaustion of Remedies

Woodford v. Ngo, 548 U.S. 81 (2006), held that a prisoner must exhaust all available administrative remedies and must do so "properly." However, the holding in *Woodford* does not end this court's inquiry but begins it. The instant motion requests that this court dismiss plaintiff's claim for failure to "properly" exhaust, and the court must decide whether plaintiff has "properly" exhausted. Defendants point to the late filing of plaintiff's first formal grievance as well as his failure to state "how and when an attempt was made to resolve the problem informally," and assert that plaintiff failed to comply with procedural rules under AR 740. The District Court of Nevada addressed this same issue in *Jones v. Stewart*, 457 F. Supp. 2d 1131 (D. Nev. 2006). In that case, Judge Reed explained what constitutes "proper" exhaustion in light of the Supreme Court's decision in *Woodford*. After a thorough review of cases applying *Woodford*, the court finds Judge Reed's reasoning most persuasive and, thus, follows it. The court quotes from the amended order below:

> The Supreme Court defines proper exhaustion as "using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." 126 S.Ct. at 2385 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir.2002)) (emphasis in original). The Court goes on to state, "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* We read Justice Alito's majority opinion in *Woodford* as setting forth two tests for "proper exhaustion." The "merits test" is satisfied when a plaintiff's grievance is fully addressed on the merits by the administrative agency and appealed through all the agency's levels. The "compliance test" is satisfied when a plaintiff complies with all "critical procedural rules," including agency deadlines. A finding that a plaintiff has met either test is sufficient for finding "proper exhaustion." Defendants must show that Plaintiff failed to meet both the merits and compliance tests to succeed in a motion to dismiss for failure to exhaust administrative remedies.

Jones, 457 F. Supp. 2d at 1134. In *Jones*, prison officials argued that they need only demonstrate that plaintiff failed to comply with procedural timelines in order to warrant dismissal, to which the court responded:

> Such a reading treats timeliness of grievances rather than proper exhaustion as the touchstone of *Woodford*. We believe that this is not the reading intended by the Court in *Woodford* and does not further the policy objectives of the PLRA's exhaustion requirement.

Id. Judge Reed further reasoned as to why the "compliance" and "merits" tests serve the policy

interests of exhaustion noted in *Woodford*:

> The policy considerations set forth in *Woodford* guide our reading of the tests and the relationship between them. According to the majority opinion, the overarching goal behind requiring exhaustion is encouraging inmates to use prison grievance procedures. *Id.* at 2385, 2387-89. The proper exhaustion requirement generally serves two purposes: protecting administrative agency authority and promoting efficiency. *Id.* at 2385. We hold that, in light of these policy concerns, the merits and compliance tests are independent, not cumulative. Satisfaction of either test is sufficient for a finding of proper exhaustion, and a defendant must show failure to meet both tests to succeed on a motion to dismiss for failure to exhaust administrative remedies. . . .
>
> The goal of protecting administrative agency authority is served by requiring [a plaintiff] to meet either the merits test or the compliance test. If a plaintiff only satisfies the merits test[,] . . . administrative agency authority is still protected. The merits test treats administrative agency actions as determining whether administrative remedies were properly exhausted. The body of critical procedural rules to which inmates must adhere is determined first under the merits test by the prison system, which decides when procedural defects bar grievances from being heard on the merits. It is only once the agency treats a rule as critical (that is, by denying claims on the basis of a procedural defect) that the court will determine whether the rule is in fact critical under the compliance test. In contrast, requiring satisfaction of the compliance test as well as the merits test for proper exhaustion would second guess the agency by determining that one of the agency's procedural rules is critical despite the agency's determination that violation of the rule does not warrant dismissal of a grievance.
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> Requiring a defendant to show failure to meet both tests leaves agencies a wider breadth of agency authority. If a plaintiff meets the merits test by having his grievance and appeals addressed on the merits, then the agency has determined whether the plaintiff exhausted the administrative agency's dispute resolution procedures to the agency's satisfaction. If the agency does not address the grievance or appeals on the merits, only then will the court move on to determine whether the inmate nonetheless exhausted available remedies by complying with all critical procedural rules, such as deadlines. It is only if an agency refuses to address a claim despite an inmate's complete compliance with all critical procedural rules, such as deadlines, that agency action would not be determinative.
>
> Likewise, the efficiency goal is served by requiring a defendant to show a plaintiff failed to meet both the merits and compliance tests before dismissal of the claim. . . . Regardless of any procedural defects, grievances heard on the merits by an agency are addressed by the agency's quicker and more economical dispute resolution procedures as intended by the PLRA. Furthermore, having an untimely grievance addressed on the merits in the administrative agency's grievance system is just as likely to convince a complainant not to pursue the matter in federal court as having a timely grievance

> addressed on the merits would be. Lastly, an administrative record is still generated when the agency hears the grievance and appeals on the merits.

Id.

Here, defendants answered all levels of plaintiff's grievances notwithstanding his failure to meet the procedural rules. As explained in *Jones*, the NDOC addressed the grievance on the merits and did not dismiss plaintiff's grievance on any critical procedural rules. Plaintiff's grievance was filed on November 26, 2002, almost two years after the incident. Defendants assert that plaintiff had fifteen days from the date of his attack to file a grievance.[3] Defendants also argue that plaintiff failed to comply with the portion of the regulation which requires him to specify how and when he attempted to resolve the matter informally. Assuming for the sake of argument that plaintiff wholly failed to comply with the procedural rules of AR 740, evidence remains that NDOC officials fully reviewed plaintiff's grievances on the merits and responded accordingly. This stands in sharp contrast to the prison official in Woodford who denied the prisoner's grievance solely on the procedural ground of untimeliness. In their first motion to dismiss, defendants submitted the affidavit of Rosemary Seals, Associate Warden of Programs at LLC, who attested to plaintiff's completion of the grievance process. Ms. Seals affidavit reads:

> Inmate Larry M. Wisenbaker #64320 first filed an Inmate Grievance regarding the January 2001 incident on November 26, 2002. It was assigned Log # 1341-121602. It progressed . . . the four levels of the inmate grievance process and was returned to him as being completed [by] way a Memorandum to him dated March 25, 2003.

#8, Ex. A. Notwithstanding the numerous "requirements" of AR 740, prison officials "completed" the grievance process. It is clear that the procedural rules on which defendants rely in the instant

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[3] Far from a model of clarity, AR 740, as it existed at the time of plaintiff's injury, fails to set forth the applicable time limits for filing grievances. The regulation states that an inmate is "expected to resolve the grievance informally," and "[i]f this effort fails, the inmate *may* file a formal grievance within fifteen (15) days of the alleged incident" (#79, Ex. A) (emphasis added). The language of the regulation suggests that filing a formal grievance within fifteen days of the incident is permitted but not required. Defendants submit a subsequent version of AR 740 which uses mandatory language. It provides, "The inmate *must* file an informal grievance within the time frames noted below . . . If the issue involves personal property damage or loss, personal injury, medical claims or any other tort claims, within six calendar months." *Id.* Ex C. In light of the ambiguity of the regulation, the court is hesitant to conclude as a matter of law that plaintiff did not comply with it.

motion played no role in the prison's failure to resolve the issue. Nor did plaintiff's noncompliance hinder their abilities to address plaintiff's grievances. Prison officials fully reviewed the merits of plaintiff's grievances and rendered their decision prior to the plaintiff filing suit.

Because plaintiff's grievance was fully addressed on the merits, the court finds that plaintiff properly exhausted available administrative remedies.

III. CONCLUSION

Based on the foregoing and for good cause appearing, the court concludes that defendant's motion to dismiss for failure to exhaust (#79) should be **DENIED**.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this report and recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This report and recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendant's motion to dismiss (#79) be **DENIED**.

DATED: June 7, 2010.

UNITED STATES MAGISTRATE JUDGE